

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

LINDSAY A.,

Plaintiff,

v.

Civil Action No.
5:20-CV-0433 (DEP)

ANDREW SAUL, Commissioner of Social
Security,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LACHMAN, GORTON LAW FIRM
P.O. Box 89
1500 East Main Street
Endicott, NY 13761-0089

PETER A. GORTON, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
625 JFK Building
15 New Sudbury St
Boston, MA 02203

CANDACE LAWRENCE, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the

Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. §405(g). are cross-motions for judgment on the pleadings.¹ Oral argument was conducted in connection with those motions on May 26, 2021, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court’s oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

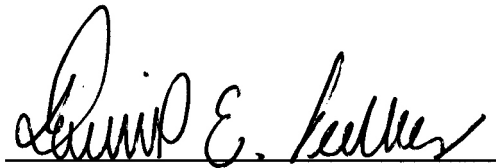
ORDERED, as follows:

- 1) Plaintiff’s motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner’s determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.

¹ This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.

4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: June 1, 2021
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
LINDSAY A.,

Plaintiff,

vs.

5:20-CV-433

ANDREW SAUL, COMMISSIONER OF SOCIAL SECURITY,

Defendant.
-----x

Transcript of a **Decision** held during a
Telephone Conference on May 26, 2021, the HONORABLE
DAVID E. PEEBLES, United States Magistrate Judge,
Presiding.

A P P E A R A N C E S

(By Telephone)

For Plaintiff: LACHMAN, GORTON LAW FIRM
Attorneys at Law
P. O. Box 89, 1500 East Main Street
Endicott, New York 13761
BY: PETER A. GORTON, ESQ.

For Defendant: SOCIAL SECURITY ADMINISTRATION
Office of General Counsel
J.F.K. Federal Building
Room 625
Boston, Massachusetts 02203
BY: CANDACE LAWRENCE, ESQ.

*Jodi L. Hibbard, RPR, CSR, CRR
Official United States Court Reporter
100 South Clinton Street
Syracuse, New York 13261-7367
(315) 234-8547*

1 (The Court and all counsel present by
2 telephone.)

3 THE COURT: I appreciate both of you and your
4 excellent presentations and have enjoyed working with you on
5 this case.

6 Plaintiff has commenced this action pursuant to 42
7 United States Code Section 405(g) to challenge an adverse
8 determination by the Commissioner of Social Security finding
9 that she was not disabled at the relevant times and therefore
10 ineligible for the benefits she sought.

11 The background is as follows: Plaintiff was born
12 in June of 1984. She's currently 37 years of age. She was
13 31 years old at the alleged onset of her disability in
14 October of 2015. And I would ask you both to mute your
15 phones, please. Plaintiff stands five foot, four-and-a-half
16 or five inches in height and weighs between 258 and
17 276 pounds, depending on the point in the record that it
18 appears. At one point it was noted that she experienced a
19 75-pound weight gain. Plaintiff is married with three
20 daughters. In January of 2019, they were ages three years,
21 two years, and four months. She lives in Port Crane,
22 New York. Plaintiff has a college degree, master's of
23 psychology. She is right-handed. She has a driver's license
24 and drives occasionally.

25 Plaintiff stopped working in or about October of

1 2015 or 2014, again, depending on where in the record you
2 look, it seems more likely that it was 2014, and she stated
3 that it was due to a medical issue. She suffered a
4 subchorionic hematoma. Plaintiff's past work includes as a
5 school attendance officer, a substitute teacher, a loan
6 officer for a financial company, and a family services
7 caseworker. That was her last position. She was also a
8 server while in college. She possesses or possessed a
9 teaching assistant license which is now expired.

10 Mentally plaintiff suffers from depression and
11 anxiety in various forms including -- has been diagnosed as
12 general anxiety disorder, panic disorder with the beginnings
13 of agoraphobia, major depressive disorder, and social
14 anxiety. She also experiences paranoia. There is a reported
15 suicide attempt at age 30, that appears at page 253 of the
16 administrative transcript, but there are no records
17 concerning that attempt.

18 Plaintiff's primary physician is Dr. Shalini
19 Bichala. She has also seen a psychologist Dr. Cheryl
20 Scott-Richard in Oakdale Psychology since April of 2015.

21 In terms of medications, plaintiff has in the past
22 been prescribed Paxil, Zoloft, trazodone, citalopram,
23 sertraline, meloxicam, and pantoprazole for a gastric issue,
24 although she was off medications, she testified, while
25 nursing her baby.

1 In terms of activities of daily living, plaintiff
2 is able to dress, bathe, groom, do some cooking, some
3 cleaning, laundry, shop one time per month, care for her
4 three daughters, and watch television. Plaintiff smokes
5 three to four times per week.

6 Procedurally, plaintiff applied for Title II
7 disability benefits on November 14, 2016, alleging an onset
8 date of October 10, 2015. In her function report she claims
9 disability based upon persistent depressive disorder, social
10 anxiety disorder, panic disorder, perinatal depression, and
11 psychotic depression. A hearing was conducted on January 31,
12 2019 by Administrative Law Judge Jude Mulvey to address
13 plaintiff's application for benefits. On February 20, 2019,
14 ALJ Mulvey issued an adverse determination which became a
15 final determination of the agency on March 2, 2020, when the
16 Social Security Administration Appeals Council denied
17 plaintiff's request for review. This action was commenced on
18 October 15 -- I'm sorry, April 15, 2020 and it is timely.

19 In her decision, ALJ Mulvey applied the familiar
20 five-step sequential test for determining disability. She
21 first noted that plaintiff was last insured on December 31,
22 2019.

23 She then proceeded to step one where she found that
24 plaintiff had not engaged in substantial gainful activity
25 since the alleged onset date of October 10, 2015.

1 At step two, she found that plaintiff suffers from
2 severe impairments that impose more than minimal limitations
3 on her ability to perform work-related functions including
4 mental health issues involving anxiety and depression, as
5 well as obesity.

6 At step three, ALJ Mulvey concluded that
7 plaintiff's impairments do not meet or medically equal any of
8 the listed presumptively disabling conditions set forth in
9 the Commissioner's regulations, specifically considering
10 Listings 12.04 and 12.06.

11 ALJ Mulvey next concluded that plaintiff retains
12 the ability to perform a full range of medium work with
13 exceptions, including a physical component and a mental
14 component. Applying that residual functional capacity,
15 plaintiff, according to ALJ Mulvey, is incapable of
16 performing any of her past relevant work.

17 At step five, where the burden of proof of course
18 shifts to the Commissioner, ALJ Mulvey noted first that if
19 plaintiff could perform a full range of medium work, a
20 finding of no disability would be required by the
21 Medical-Vocational Guidelines set forth in the regulations,
22 and specifically Rule 203.29. Relying on the testimony of a
23 vocational expert in light of the additional physical and
24 mental impairments noted, limitations noted in the RFC
25 finding, the administrative law judge concluded that

1 plaintiff is capable of performing work that is available in
2 the national economy, representative occupations being retail
3 stocker and linen room attendant, and thus concluded that
4 plaintiff was not disabled or was not disabled at the
5 relevant times.

6 The court's function, as you know, is to determine
7 whether correct legal principles were applied and the
8 resulting determination supported by substantial evidence,
9 being defined as such relevant evidence as a reasonable mind
10 would accept as sufficient to support a finding or
11 conclusion. It is a highly deferential standard.

12 The plaintiff raises four essential arguments, some
13 of which are interrelated.

14 The first relates to the consideration of the
15 treating source opinion of Dr. Scott-Richard and subsumed
16 within that is the contention that the ALJ arbitrarily
17 substituted her judgment for undisputed records without an
18 overwhelmingly convincing basis and that the residual
19 functional capacity was crafted by the ALJ from their medical
20 records.

21 The second argument is that there's no support for
22 the distinction in the RFC finding that plaintiff can have
23 occasional interaction with supervisors and coworkers but
24 none with respect to the public.

25 The third is that because the residual functional

1 capacity is not supported, the step five determination is
2 also flawed.

3 And the fourth is that the administrative law judge
4 should have at least considered a closed period.

5 Dr. Scott-Richard of course qualifies as a treating
6 source. This case is being addressed under the regulations
7 which applied prior to March of 2017. As a treating source,
8 Dr. Scott-Richard's opinions were entitled to controlling
9 weight provided that those opinions were supported by
10 medically acceptable clinical and laboratory diagnostic
11 techniques, and the opinions are not inconsistent with other
12 substantial evidence.

13 The opinions of a treating source are not
14 controlling if they are contrary to other substantial
15 evidence in the record, including the opinions of other
16 medical experts. Where there's conflicts in the form of
17 contradictory medical evidence, the resolution is properly
18 entrusted to the Commissioner. The ALJ, when considering a
19 medical opinion and deciding whether controlling weight
20 should be given to a treating source's opinion, must apply
21 several factors which we refer to in this circuit as *Burgess*
22 factors to determine whether controlling weight should be
23 given, and if not, what, if any, weight should be assigned to
24 the opinion of a treating source. Those are listed in 20
25 C.F.R. Section 404.1527. When the ALJ repudiates a treating

1 source opinion, good reasons must be provided for the
2 rejection. The Second Circuit of course has noted that when
3 there is no rote consideration of *Burgess* factors, the court
4 can make a searching review of the record and can determine
5 that the treating source rule was not violated. *Estrella v.*
6 *Berryhill*, 925 F.3d 90 from May 29, 2019.

7 In this case, Dr. Scott-Richard was a treating
8 source, saw the plaintiff 31 times between 2015 when
9 treatment began through November 13, 2018. Dr. Scott-Richard
10 is a specialist. The doctor provided a medical source
11 statement on December 7, 2018 that appears at 297 and 298 of
12 the administrative transcript and it notes marked limitations
13 in virtually every area noted except between marked and
14 extreme in area of ability to respond appropriately to
15 ordinary stressors in a work setting with simple tasks. It
16 also opines that plaintiff would be off task more than
17 20 percent of the time and absent three or more days per
18 month. The opinion was mentioned at page 19, although in
19 that mention, that was during the step three analysis, she's
20 referred to only as a psychologist and not by name. She is
21 referred to by name as the Commissioner rightly argued later
22 on in the opinion, including at page 21 and 22. And then her
23 opinion is summarily given only partial weight, stating that
24 the limitations identified are not supported by psychiatric
25 treatment records.

1 I guess I would have to say there's no explicit
2 consideration of the *Burgess* factors as we find in many of
3 these decisions. I'm not sure that it is accurate to say
4 that the treatment notes don't support the finding. The
5 administrative law judge, when making that kind of a
6 determination, must set forth rationale and explain it
7 sufficiently to permit meaningful judicial review. As the
8 plaintiff has argued, Second Circuit noted as much in *Ferraro*
9 *v. Saul*, 806 F.App'x 13, Second Circuit summary order from
10 March 12, 2020, and *Byrne v. Berryhill*, 752 F.App'x 96, a
11 memorandum opinion from February 8, 2019. It is also noted
12 in *Drake v. Saul*, 839 F.App'x 584 from December 11, 2020.

13 I believe Judge Mulvey should have made a more
14 fulsome analysis and when she said that the treatment records
15 didn't support it, she should have put forth a more fulsome
16 explanation. Obviously a lot of what was reported to
17 Dr. Scott-Richard was based on plaintiff's subjective
18 statements, but of course in a mental health case, very often
19 those statements, as well as the interpretation of those
20 statements, is critical. I also note that many of the
21 treatment records that I reviewed show that plaintiff was
22 depressed, anxious, page 248, clearly in distress, tearful,
23 has a depressed affect, several of them. So I believe the
24 treating source rule was violated.

25 The bigger issue, as plaintiff's counsel has

1 argued, is on the issue of absenteeism and off task.
2 Dr. Scott-Richard, the treating source, identified extreme
3 limitations that are work preclusive. Dr. Moore, the
4 consultative examiner who issued an opinion that appears at
5 256 through 262 of the administrative transcript, January 19,
6 2017, found that marked limitation in the ability to maintain
7 a regular work schedule. The only opinion, other opinion to
8 somewhat indirectly address the issue is from Dr. E. Kamin,
9 January 26, 2017. In his worksheet, he found a moderate
10 limitation in the ability to complete a normal workday and
11 workweek without interruptions from psychologically-based
12 symptoms and to perform at a consistent pace without an
13 unreasonable number and length of rest periods. That appears
14 at 96 of the administrative transcript.

15 Unfortunately, although the mental residual
16 functional capacity is supposed to elaborate and describe the
17 extent of that moderate limitation, it is not done and in
18 fact there's no statement in the -- that I could find in the
19 mental residual functional capacity that plaintiff is capable
20 of performing simple work on a regular basis. So I believe
21 that the finding that plaintiff is -- the residual functional
22 capacity finding, which does not include any limitation
23 related to schedule and off task, is flawed and therefore the
24 step five determination which hinges on the residual
25 functional capacity finding is also flawed.

1 So I will grant judgment on the pleadings to the
2 plaintiff. I don't find persuasive evidence of disability, I
3 think this is a matter that should be remanded for further
4 consideration by this or another administrative law judge.
5 Thank you both for excellent presentations, I hope you have a
6 good afternoon.

7 MR. GORTON: Thank you, your Honor.

8 MS. LAWRENCE: Thank you.

9 (Proceedings Adjourned, 2:34 p.m.)

1
2 CERTIFICATE OF OFFICIAL REPORTER
3
4

5 I, JODI L. HIBBARD, RPR, CRR, CSR, Federal
6 Official Realtime Court Reporter, in and for the
7 United States District Court for the Northern
8 District of New York, DO HEREBY CERTIFY that
9 pursuant to Section 753, Title 28, United States
10 Code, that the foregoing is a true and correct
11 transcript of the stenographically reported
12 proceedings held in the above-entitled matter and
13 that the transcript page format is in conformance
14 with the regulations of the Judicial Conference of
15 the United States.

16
17 Dated this 27th day of May, 2021.
18
19

20 /S/ JODI L. HIBBARD

21 JODI L. HIBBARD, RPR, CRR, CSR
22 Official U.S. Court Reporter
23
24
25